Supreme Court, U.S.
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No. __-____ 95 118

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD.,

*Petitioner,*

—v.—

HYUNDAI CORP. U.S.A. AND INCHON IRON & STEEL CO., LTD.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether an intermediate time charterer of a ship can be liable as a "carrier" under Section 1(a) of the Carriage of Goods by Sea Act ("COGSA") if it is not a party to the bill of lading.

2. Whether an ocean carrier's duty under COGSA to exercise due diligence to make the vessel seaworthy "before and at the beginning of the voyage" continues after the voyage has commenced.

## PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to this proceeding are Petitioner Hyundai Merchant Marine Co., Ltd. and Respondents Hyundai Corp., U.S.A. and Inchon Iron & Steel Co., Ltd.

Parent corporations of Petitioner Hyundai Merchant Marine Co., Ltd. are:

Hyundai Engineering & Construction Co. Ltd.
Hyundai Pipe Co. Ltd.
Kemkang Development Industrial Co. Ltd.
Koryeo Industrial Development Co. Ltd.
Hyundai Precision & Industry Co. Ltd.
Hyundai Motor Service Co., Ltd.

Non-wholly owned subsidiaries of Petitioner Hyundai Merchant Marine Co. Ltd. are:

None.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Hyundai Merchant Marine Co., Ltd., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The decision of the Court of Appeals of which review is sought (1a)[1] was entered on April 11, 1995. 54 F.3d 768 (3d Cir. 1995). The opinion of the District Court on the merits (5a) is not officially reported. The District Court's opinion

[1] References to the Appendix hereto are cited as "___ a."

denying Summary Judgment (24a) is reported at 800 F. Supp. 124 (D.N.J. 1992).

## JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1995. A petition for a writ of certiorari is due on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## TREATIES AND STATUTES INVOLVED

This case involves the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.* (1936) and specifically Sections 1, 3 and 5 of that Act.

Section 1 (46 U.S.C. § 1301), Definitions, provides in pertinent part:

> When used in this chapter—
>
> (a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> (b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

Section 3 (46 U.S.C. § 1303), Responsibilities and liabilities of carrier and ship, provides in pertinent part:

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Section 5 (46 U.S.C. § 1305), Surrender of rights; increase of liabilities; charter parties; general average, provides in pertinent part:

> The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter.

COGSA implemented the International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading ("the Hague Rules"), June 29, 1937, 51 STAT. 233, T.S. 931, 120 L.N.T.S. Sections 1, 3 and 5 of COGSA.

## STATEMENT

### A. Statutory Framework

Congress enacted COGSA in 1936 "to define by law the rights and liabilities of water carriers and shippers in foreign commerce." *Uniform Ocean Bills of Lading—Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936). Modeled on the Hague Rules, COGSA prescribes both the rights and responsibilities of common carriers (the companies that own and operate the ocean-going vessels that carry cargo for hire), and the rights and responsibilities of shippers and consignees (the companies that own the cargo shipped on board the carriers' vessels). By its terms, COGSA applies to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade . . . ." 46 U.S.C. § 1300.

The statute establishes a carefully crafted balance of rights and duties. On the one hand, COGSA imposes on the carrier the non-delegable obligation "to exercise due diligence to * * * [m]ake a vessel seaworthy" before and at the beginning of the voyage (46 U.S.C. § 1303(1)), and to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 U.S.C. § 1303(2). On the other hand, the statute immunizes the carrier from liability for losses resulting from numerous causes, (46 U.S.C. § 1304(2)(a) through (q)), and limits a carrier's liability to $500 per package or customary freight unit unless the cargo owner declares the value of the cargo in advance. 46 U.S.C. § 1304(5).

Under COGSA, only a "carrier" of goods is liable for loss or damage. 46 U.S.C. §§ 1302, 1303. A carrier "includes the owner or the charterer who enters into a contract of carriage with the shipper." 46 U.S.C. App. § 1301(a). A "contract of carriage" is a contract for the carriage of goods by sea covered by a bill of lading or similar document of title. 46 U.S.C. § 1301(b).[2] COGSA is not applicable by its own force to charter parties, but it does apply to bills of lading issued under charter parties. 46 U.S.C. § 1305.[3]

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[2] A bill of lading is typically a single-page form document that the carrier or its agent issues to the shipper at the port of loading. It acknowledges the carrier's receipt of the cargo for transportation to a designated port of discharge at an agreed freight rate. It is frequently a negotiable document of title issued to order, which the shipper negotiates to its buyer incident to the sale of the goods. It also may be the contract of carriage between the carrier and the shipper (and subsequent holders of the bill of lading). The buyer or consignee takes delivery of the goods from the carrier at the port of discharge after it returns the bill of lading to the carrier or its agents. The reverse side of the bill of lading typically contains numerous boilerplate terms. *See generally Organes Enterprises, Inc. v. M/V Khalij Frost*, 1989 A.M.C. 1460 (S.D.N.Y. 1989).

[3] Bills of lading are usually issued under voyage charters or other types of cargo booking contracts. Between the voyage charterer who owns the cargo and the entity it chartered from (whether another charterer or the vessel owner), such bills of lading serve only as receipts for the

## B. The Commercial Context

Registered owners of oceangoing vessels frequently "charter" their vessels to other companies. A charter party is a private contract, and the parties are free to allocate risks contractually either by express contractual provision or by allocating specific duties concerning the cargo, the voyage, and the ship. *Continental Grain Co. v. Puerto Rico Maritime Shipping Authority*, 972 F.2d 426 (1st Cir. 1992).

A time charter is a contract for the use of a vessel for a particular period of time. The time charterer has the right to direct the movements of the vessel, but the owner retains possession and control through the master and crew, who remain in his employ. 2 Schoenbaum, *Admiralty and Maritime Law*, 169-170 (2d ed. 1994). Much of the world's merchant fleet operates under time charter. Gram, *Chartering Documents*, 50 (1981). A voyage charter is a contract to hire a vessel for the carriage of goods from one port to another. A voyage charter usually is for the carriage of a full cargo. Unlike a time charterer, who pays for the vessel's use on a daily hire rate, the voyage charterer pays freight calculated on a lump sum or unit basis.[4] *See* 2 Schoenbaum at 175-176.

In the absence of a provision to the contrary in the charter party, a charterer may subcharter the vessel to another party,

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goods and, if the bills are "to order, " as documents of title. Unless the bill of lading is negotiated to a third party by the voyage charterer, the voyage charter party is the contract of carriage. *See, e.g., The Marine Sulphur Queen*, 460 F.2d 89, 103 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972).

[4] A vessel owner's (or chartered-owner's) decision to charter (or subcharter) a vessel either on a voyage charter basis or on a time charter basis depends mainly on freight market trends. Bes, *Chartering Practice*, 25-29 (1960). When long-term employment with a fair margin of profit is possible, vessel owners may choose to time charter the vessel to avoid the market fluctuations that arise when trading the vessel by the voyage. *Id.* When the freight market is depressed, the owner may trade the vessel on a voyage basis rather than undertake a long-term commitment at an unfavorable rate. *Id.*

so long as the terms of the subcharter do not conflict with those of the "head" charter. During any one voyage, therefore, a vessel may be subject to several charters.[5] Each charterer is in contractual privity with the next party up and down the chain, and the parties' legal obligations *vis-á-vis* each other are governed by the terms of those charters. Healy and Sharpe, *Admiralty* 265 (2d ed. 1986).

The last charterer in the chain usually arranges with the cargo owner for the carriage of the goods. The last charterer also may be responsible for making arrangements to load the cargo and nominating an agent at the loadport. The terms of the various charters determine who nominates the agent. The owner and intermediate charterers may use that agent at the loadport. *See generally* Cooke, *Voyage Charters* 497-498 (1993); 2 Schoenbaum at 33-34.

Charter parties usually provide that bills of lading will be signed by the master as presented or may be signed by the charterer in conformance with the mate's or tally receipts. In practice, the bills usually are prepared by an agent and are signed by the loading port agent "for the master." Cooke at 388-89; Scrutton, *On Charterparties and Bills of Lading* 54 (19th ed. 1984).

### C. The Present Controversy

The M/V VULCA sank in the Pacific Ocean on December 31, 1989 with its full cargo of scrap metal. The VULCA was owned by Vulcan Navigation Corp., was time chartered to Petitioner Merchant Marine, and was voyage chartered to Clarendon Limited ("Clarendon"). The Vulcan Navigation/Merchant Marine time charter contained the following relevant provisions:

---

[5] For example, in *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1105-1106 (5th Cir. 1985), the vessel was owned by Orient, bareboat chartered to Eternity, time chartered to Iino, sub-time chartered to Canadian, voyage chartered to Seanav, and sub-voyage chartered to Corinth.

Clause 8:

That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with the ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and the Charterers are to load, stow, discharge and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's and Tally Clerk's receipts.

Clause 61:

Master is to sign the Bills of Lading for cargo as presented in conformity with Mate's or Tally Clerk's receipts. However, at Charterer's option, Charterers or their agents may sign Bills of Lading on behalf of the Master always in conformity with Mate's or Tally Clerk's receipts. All Bills of Lading shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities that may arise from any inconsistency between this Charter and any Bills of Lading signed by the Charterers or their agent.

(C.A. App. 1027, 1036).[6]

The Merchant Marine/Clarendon voyage charter contained the following relevant provisions:

6. The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charter Party.

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[6] References to the Joint Appendix in the Court of Appeals are cited as "C.A. App. ___."

12. Cargo to be loaded, stowed, trimmed and discharged by the Charterers, free of risk and expense to the vessel.

29. Charterer's agents both ends, vessel paying the customary agency fee.

34. Master to authorize Agents on arrival at loading port to sign and issue Bills of Lading any time Charterers desire for any quantity loaded up to that time.

(C.A. App. 1044, 1046-1048).

The cargo was loaded at Jersey City by stevedores arranged for by Clarendon, who also nominated Overseas Shipping, Inc. ("Overseas") to act as loading port agent. The bill of lading was signed and issued by Overseas "for the master," pursuant to express authorization given by the VULCA's master to sign the bill of lading on his behalf. (8a; C.A. App. 1081). The bill of lading recited that its terms and conditions were "as per charter party," but made no reference to any specific charter party. (C.A. App. 1009). The bill of lading made no reference to Petitioner. *Id.* The bill of lading named only the master and the M/V VULCA. *Id.* Overseas received no authorization from Petitioner to sign the Bill of Lading, (C.A. App. 569-570), and the record contains no evidence that Petitioner directed the master to authorize Overseas to issue the bill of lading.

The VULCA departed from New Jersey on November 15, 1989. (C.A. App. 1379). On November 24, 1989, the master reported experiencing exhaust valve problems, which delayed transit through the Panama Canal. The vessel proceeded to Long Beach to take on scheduled bunkers. At Long Beach, spare parts requested by the owner were delivered, and the master conducted maintenance repairs. The vessel departed Long Beach on December 22, 1989, began taking on water forward on December 25th and sank six days later. The cause of the VULCA taking on water was never established. (14a-16a).

Respondent filed suit in the United States District Court for the District of New Jersey on April 1, 1990, naming Petitioner, the hull proceeds of the M/V VULCA, and Vulcan Navigation as defendants. Petitioner impleaded Clarendon, but the action against Clarendon was discontinued without prejudice pursuant to a stipulation reserving arbitration rights under an arbitration clause in the charter party between Petitioner and Clarendon. Respondent did not claim against Clarendon. A default judgment thereafter was entered against Vulcan Navigation. The case proceeded solely against Petitioner.

A bench trial was conducted from March 29 through April 1, 1993 before the Honorable Harold A. Ackerman. On September 2, 1994, the District Court rendered its decision holding Petitioner to be a COGSA carrier and finding Petitioner liable for failing to carry its burden of proving that it exercised due diligence to provide a seaworthy vessel. (5a). In holding Petitioner to be a COGSA carrier, the Court stated in its Conclusions of Law:

> All these factors point to one conclusion: there is much evidence "tying [Merchant Marine] to the bill involved." *Joo Seng Hong Kong Co., Ltd. v. S.S. UNIBULKFIR*, 483 F. Supp. 43, 46 (S.D.N.Y. 1979); *Samsung*, 798 F. Supp. at 187. In other words, the evidence convinces me that Merchant Marine authorized the bill of lading. Alternatively, Merchant Marine was so tied to the issuance of the bill of lading and the cargo voyage that under the practical considerations outlined by this court in its decision on the defendant's summary judgment, it would be inequitable to find Merchant Marine not liable on the bill of lading.
>
> Therefore, I find that because of Merchant Marine's involvement in the contract of carriage, it is a COGSA carrier and is subject to the concomitant rights and responsibilities.

(19a).

With respect to due diligence, the Court reasoned:

> However, from the time the voyage began, Merchant Marine was repeatedly apprised of the deteriorating condition of the ship. In one rather ominous report, Merchant Marine was told that the master was giving evasive responses to inquiries about the ship's condition and that the problems appear more serious than previously thought. Yet when the ship reached California needing additional repairs, Merchant Marine did not seek an on-hire survey or any inspection or try to resolve the problems in any way. Looking at the record in this case, one simply cannot say that Merchant Marine exercised due diligence to provide a seaworthy vessel.

(21a-22a).

The Court entered judgment against Merchant Marine in the amount of $5,085,220.52 plus interest.

The Third Circuit Court of Appeals affirmed the judgment of the District Court on April 11, 1995, "substantially for the reasons set forth in the district court's opinion." (2a).

## REASONS FOR GRANTING THE WRIT

The Court below has decided important and recurring questions of federal maritime law contrary to established law in other circuits. Although Petitioner did not issue the bill of lading and was not in privity of contract of carriage with Respondents, the court nevertheless held Petitioner to be a COGSA "carrier" because of its "involvement" in the carriage. This decision is in direct conflict with decisions of the First, Second, Fourth and Fifth Circuits, which have held that only a party to the bill of lading contract can be liable as a COGSA "carrier." The Court of Appeal's decision thus creates an untenable circuit conflict, depriving maritime businesses of the uniformity, both on a national and international level, that is so essential to their commercial relations. The

decision is also greatly flawed. It impermissibly expands the express language of Section 1 of COGSA which, as written, imposes liability for cargo loss or damage only on one "who enters into a contract of carriage with a shipper."

Moreover, the Court's ruling that under Section 3 of COGSA the carrier must exercise due diligence to make the ship seaworthy after commencement of the voyage irreconcilably conflicts with all reported decisions of other Circuits. The decision unjustifiably abandons settled case law, which holds that the carrier's duty to exercise due diligence is determined when the ship commences the voyage, not by events that occur thereafter.

If left undisturbed, the Court's decisions on these issues will undermine the balance between shippers and carriers established by Congress in COGSA and will promote unnecessary litigation against participants in a maritime venture other than the "carrier," as defined in COGSA and in the maritime laws applicable in the overwhelming majority of countries.

### A. The Court of Appeal's Decision That Petitioner is a COGSA Carrier is in Direct Conflict with Decisions of the First, Second, Fourth and Fifth Circuits.

Under COGSA, only a "carrier" is liable for cargo loss or damage. 46 U.S.C. §§ 1302, 1303; *Matter of Intercontinental Properties Management*, 604 F.2d 254, 258 (4th Cir. 1979). COGSA defines "carrier" as "the owner or the charterer who enters into a contract of carriage with the shipper." 46 U.S.C. § 1301(a).[7] Generally, in voyage and time charters, the ship

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[7] The language of Section 1(a) of COGSA is identical to that of Article 1(a) of the Hague Rules. 1 Sturley, *The Legislative History of the Carriage of Goods by Sea Act* 28-29 (1990). The first draft of the section of the Hague Rules prepared by the International Law Association used the words "owner and charterer;" however, it was promptly amended to read "owner or the charterer." *Id.* at 78.

owner, who retains possession and control of the vessel, will be the COGSA carrier. *Southern Block and Pipe Corp. v. M/V Adonis*, 341 F. Supp. 879 (E.D. Va. 1970), *aff'd*, 457 F.2d 924 (4th Cir. 1972). A voyage or time charterer may become a COGSA carrier, however, if the charterer issues the bill of lading or directs another to issue the bill of lading *on its behalf*. *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278, 283 (S.D.N.Y.), *aff'd*, 122 F.2d 266 (2d Cir. 1941).

**1. The Existing Law**

Until the decision of the Court of Appeals below, all of the Circuits that had considered the issue uniformly held that only a party to the bill of lading contract can be liable as a COGSA "carrier." *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5th Cir. 1995); *Cactus Pipe & Supply Co. v. M/V Montmarte*, 756 F.2d 1103 (5th Cir. 1985); *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229 (5th Cir. 1985); *Matter of Intercontinental Properties*, 604 F.2d 254 (4th Cir. 1979); *Yeramax Int'l v. S.S. Tendo*, 595 F.2d 943 (4th Cir. 1979); *Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972); *EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715 (1st Cir. 1984). As recently stated by the Fifth Circuit:

> Thyssen and Associated rely on cases from the Second Circuit to assert a direct claim against the vessel owner under COGSA in the absence of privity of contract. *See Siderius, Inc. v. M.V. AMILLA*, 880 F.2d 662 (2d Cir. 1989) (holding that when charterer's liability to a cargo owner arises because vessel was not seaworthy, vessel owner may be directly liable to cargo owner for breach of warranty of seaworthiness); *Samsung America, Inc. v. M/T FORT PRODUCER*, 798 F. Supp. 184 (S.D.N.Y. 1992) (holding both charterer and vessel owner liable because they were closely related business entities with authority to act for each other); *Joo Seng Hong Kong Co., Ltd. v. S.S. UNIBULKFIR*, 483 F.Supp. 43, 46 (S.D.N.Y. 1979) (construing term "carrier" broadly to

> allow for discovery before dismissal of parties not named on bill of lading). However, these cases are distinguishable, and are not controlling authority in this Circuit which requires privity of contract of carriage before liability under COGSA arises.

*Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349, 1353 (5th Cir. 1995). (Emphasis added.)[8]

*Thyssen*, *Cactus Pipe*, *Pacific Employers*, *Intercontinental Properties*, *Yeramex International*, *Demsey*, and *EAC Timberlane* all held, based on COGSA's express definition of "carrier" as one who "enters into a contract of carriage," that an owner or charterer is not a party to the bill of lading (and therefore not liable as a COGSA carrier) if it did not issue the bill or if the party issuing the bill on its behalf lacked authority to do so.[9] This reading of COGSA is consistent with the plain language of COGSA and is in keeping with this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959), in which the Court refused to

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[8] A petition for re-hearing in *Thyssen* was denied. 1995 U.S. LEXIS 13563 (5th Cir. May 31, 1995). The Court, however, amended a section of its prior opinion, pertaining to a direct conflict between the Fifth and Fourth Circuits on the effect of an indemnity provision in a time charter on the issue of who is the COGSA carrier. Compare *Thyssen* with *Yaramex Int'l v. S.S. Tendo*, 595 F.2d 943 (4th Cir. 1979).

[9] The issue most commonly arises when a charterer issues a bill of lading "for the master." If the charter party authorized the charterer to issue bills of lading, a bill of lading "for the master," through agency principles, would bind the owner as a party to the contract of carriage. If, however, the charterer was not authorized to issue bills of lading, privity would not exist, and the owner would not be bound. *See, e.g., EAC Timberlane v. Pisces Ltd.*, 745 F.2d 715 (1st Cir. 1984); *Cactus Pipe & Supply Co. v. M/V Montmarte*, 756 F.2d 1103 (5th Cir. 1985). The same principles apply to time charterers. *See, e.g., Agroexport and B.U.O. Assurance Int'l v. S/S Jordanka Nikolova*, 1983 A.M.C. 1219 (S.D.N.Y. 1983); *Yasuda Fire and Marine Ins. Co. v. M/V Indian City*, 1981 A.M.C. 1451 (M.D.Fla. 1980) (not otherwise reported); *Thyssen Steel Corp. v. S.S. Adonis*, 864 F. Supp. 1332 (S.D.N.Y. 1974).

expand COGSA to find a stevedore who loaded cargo to be a COGSA "carrier":

> The Act [COGSA] is clearly phrased. It defines the term "carrier" to include "the Owner or Charterer who enters into a contract of carriage with the shipper."

**2. The Decision Below**

In direct conflict with the First, Second, Fourth and Fifth Circuits, the Court below has held that a party's mere "involvement" in the contract of carriage is sufficient to make that party a COGSA "carrier." The Court below concluded: "Therefore I find that because of Merchant Marine's involvement in the contract of carriage, it is a COGSA carrier and is subject to the concomitant rights and responsibilities." In reaching this conclusion, the Court observed that "there was much evidence 'tying (Merchant Marine) to the bill involved' " and that Merchant Marine "was so tied to the issuance of the bill and the cargo voyage that it would be 'inequitable' to find Merchant Marine not liable on the bill of lading." (19a).

The Court based its holding entirely on two decisions of the Southern District of New York, *Joo Seng Hong Kong Co. v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979) and *Samsung America, Inc. v. M/T Fort Producer*, 798 F. Supp. 184 (S.D.N.Y. 1992). Both of these cases rejected the privity requirement in favor of a looser "involvement" test. *Joo Seng* was very specific in this regard:

> While the statute thus leaves much to judicial interpretation, the question whether Cook is liable to the plaintiff "under" the bills of lading as a carrier is not one which turns on whether Cook "issued" the bills in a strict, commercial law sense.

* * * *

> As indicated above, the statutory language of COGSA itself supports a broad definition of the term "carrier." The statute seems to have been deliberately drawn so as not to limit the term to a party to the bill of lading or contract of carriage. 46 U.S.C. § 1301(a).

483 F. Supp. at 45-46.

The Court below also stated in its conclusions of law that the "evidence convinces me that Merchant Marine authorized the bill of lading." (19a). The Court, however, made no finding of fact, and there is no evidence in the record, that Petitioner authorized issuance of the bill of lading on its behalf. The placement and context of the Court's conclusion of law demonstrate that by "authorized" the Court meant "tied to or involved in" the carriage. This is clear from the Court's ultimate conclusion that Petitioner was a COGSA carrier because of its "involvement in the contract of carriage." (19a).

The Third Circuit's decision that a non-party to the bill of lading is a COGSA carrier represents an unwarranted judicial expansion of COGSA's statutory language and creates a direct and irreconcilable conflict between the Circuits as to the correct interpretation of COGSA. This Court should grant certiorari to resolve this conflict and clarify the meaning of one of the most important statutes in international maritime commerce.

### 3. The Decision Below is Wrong

The decision below is wrong for three reasons. First, it ignores the clear statutory language of COGSA. Respondents' claim arises exclusively under the bill of lading, which is the contract of carriage in this case.[10] The bill of lading, however, does not mention Petitioner. The record is devoid of any evidence whatsoever that Petitioner issued the bill of lading, or instructed the VULCA's master or Overseas to issue bills of

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[10] The voyage charter was not the contract of carriage with Respondents. The only contract to which Respondents are parties is the bill of lading. *See* note 3, *supra*.

lading on Petitioner's behalf. Although the time charter party with the shipowner gave Petitioner the option to issue bills of lading, Petitioner never exercised that option. Since Petitioner did not issue the bill of lading, or direct it to be issued, Petitioner cannot be a "carrier" as defined by Section 1(a) of COGSA.

The bill of lading does, however, name the Vulca's master. The master authorized Overseas in writing to issue the bill of lading. (8a). Overseas, who was Clarendon's agent as stipulated by clause 29 of the voyage charter party, issued the bill of lading "for the master." (C.A. App. 1047). The proper COGSA carrier, therefore, is the owner, Vulcan Navigation.[11]

Second, the decision creates an impossible standard to enforce by making mere "involvement" legally equivalent to entry into a contract of carriage. The vagaries of determining who was "involved" in the carriage would lead to absurd results clearly contrary to the intent of COGSA. For example, all charterers in the chain (which in *Cactus Pipe* totaled five) would be liable as COGSA carriers. In addition, brokers who book cargo and issue booking notes, and agents who prepare bills of lading and other shipping documents, arguably are "involved" and closely tied to the carriage.

Finally, the decision misapprehends the commercial reality of the maritime industry. The vessel owner always retains control over the seaworthiness and navigation of the vessel. This is because the owner's employees, including the master, are present on the vessel and in control. *Southern Block and Pipe Corp. v. M/V Adonis*, 341 F. Supp. 879, 883 (E.D. Va.

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[11] The master has inherent authority to bind the vessel owner and did so by authorizing Overseas to sign the bill of lading on his behalf. Under the general maritime law, the master has general authority to issue and sign bills of lading on behalf of the owner. *The Schooner Freeman*, 59 U.S. (18 How.) 182 (1855). The master's authority to sign bills of lading derives from his right to bind the owner in matters relating to the employment and business of the ship. *Pope v. Nickerson*, 19 F. Cas. 1022 (C.C.D. Mass. 1844).

1970), *aff'd*, 457 F.2d 924 (4th Cir. 1972). Under "FIOST" (free in out stowed and trimmed) loading terms, such as those in the voyage charter here, the voyage charterer is responsible for the loading and securing of the cargo. *St. Ioannis Shipping Corp. v. Zidell Explorations, Inc.*, 222 F. Supp. 299, 305 (D.Ore. 1963), *aff'd*, 336 F.2d 194 (9th Cir. 1964); Brodie, *Dictionary of Shipping Terms* 78 (2d ed. 1994). The time charterer, however, has no role in the navigation or cargo operations of the vessel. It is a mere intermediary, simply reletting its right to use the space on the ship.

If the time charterer books the cargo, and issues its own bill of lading, then the time charterer has knowingly made itself a party to the bill of lading and is properly liable as a COGSA carrier. *See Pendleton v. Benner Line*, 246 U.S. 353 (1918); *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266 (2d Cir. 1941); *Centennial Ins. Co. v. Constellation Enterprise*, 639 F. Supp. 1261 (S.D.N.Y. 1986). But no logic supports holding a time charterer who does not issue a bill of lading liable for cargo damage caused by operational, mechanical, or navigational faults of the vessel or those who man her. Such liability should properly be borne, and historically has been borne, by the vessel owner. *See, e.g., Office of Supply, Government of the Republic of Korea v. M/V Naftoporus*, 1987 A.M.C. 697 (S.D.N.Y. 1985) (not otherwise reported); *Southern Block and Pipe Corp. v. M/V Adonis*, 341 F. Supp. 879 (E.D.Va. 1970), *aff'd*, 457 F.2d 924 (4th Cir. 1972); *Agroexport and B.U.O Assurance Int'l v. S/S Jordanka Nikolova*, 1983 A.M.C. 1219 (S.D.N.Y. 1983) (not otherwise reported); *Thyssen Steel Corp. v. S.S. Adonis*, 364 F. Supp. 1332 (S.D.N.Y. 1974).

### 4. Commercial and International Considerations

"COGSA is the centerpiece of maritime commerce. It allocates the risk of loss for damage to cargo—valued at over $200,000,000—carried to or from the United States each year on ocean liners." Sturley, *Observations of the Supreme*

*Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1265 (1989). Harmony and predictability are necessary for maritime commerce to function. The decision below disrupts the settled law of time charterer liability and introduces substantial uncertainty into this important area.

COGSA is this country's enactment of the Hague Rules, an International Convention adopted by most other maritime countries. The Third Circuit's interpretation of COGSA therefore has international ramifications. (Sturley, *Observations*, supra, at 1265).[12] There is little question that under English law the Petitioner would not be a "carrier"; the contract would be considered that of the owner. *Scrutton on Charter Parties and Bills of Lading*, 66-68 (18th ed. 1974); Wilford, Coghlin and Kimball, *Time Charters* 270-271(3d ed. 1989). *See also Lantic Sugar Ltd. v. Blue Tower Trading Corp.*,1994 A.M.C. 2771, 2777 (Canada, Federal Court of Appeals, 1993), which found the master, on whose behalf a bill of lading is signed, to be an employee of the owner and presumed to be acting as the authorized agent only of the owner, in the absence of evidence to the contrary.

Decisions such as the Third Circuit's here and the Southern District of New York's in *Joo Seng* and *Samsung* disrupt the international uniformity now achieved and undermine the purposes of the international convention. As recently observed by this Court in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, No. 94-623, 1995 U.S. LEXIS 40676, at *18 (June 19, 1995):

> In light of the fact that COGSA is the culmination of a multilateral effort "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and

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[12] See particularly Sturley's remarks that (1) the basic purpose of COGSA was to enhance uniformity, (2) uniformity was required for predictability in risk allocation, and (3) conflicting interpretations of COGSA result in forum shopping.

> shippers inter se in international trade," *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959), we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue. See *Sturley*, *supra*, at 736 (conflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern).

This Court should grant certiorari to realign the law with the decisions of the First, Second, Fourth and Fifth Circuits, the realities of maritime commerce, and international maritime law.

### B. The Decision Below Imposes an Obligation Upon a Carrier of Goods by Sea to Exercise Due Diligence to Make The Ship Seaworthy After The Beginning of a Voyage, in Conflict With Established Maritime Law.

#### 1. Under The Decision Below, a COGSA Carrier Must Exercise Due Diligence To Make The Vessel Seaworthy After The Beginning of a Voyage.

COGSA expressly limits the time during which a carrier[13] has the obligation of exercising due diligence to make the vessel seaworthy. Section 3(1) of COGSA provides, in pertinent part:

> "The carrier shall be bound *before and at the beginning of the voyage* to exercise due diligence to—
>
> (a) Make the ship seaworthy."

46 U.S.C. § 1303(1) (Emphasis added.)

There was no finding of fact that Petitioner failed to exercise due diligence to make the ship seaworthy "before and at

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[13] This section assumes, *arguendo*, that Petitioner was the "carrier," as found by the Court below.

the beginning of the voyage." Indeed, the Court found that "it does not appear that Merchant Marine was made aware of . . . difficulties" on the voyage immediately preceding Petitioner's charter. (13a). Furthermore, the Court found that Petitioner and the vessel owner conducted a joint (on-hire) survey of the ship at the load port. (14a). The opinion does not mention the conclusion of that survey, which in fact was that the vessel was "ready to load cargo." (C.A. App. 1058).

The District Court offered the following explanation for its anomalous ruling, which was affirmed on appeal, that Petitioner had breached its statutory obligation to exercise due diligence to make the vessel seaworthy:

> [F]rom the time the voyage began, Merchant Marine was repeatedly apprised of the deteriorating condition of the ship. In one ominous report, Merchant Marine was told that the master was giving evasive responses to inquiries about the ship's condition and that the problems appear more serious than previously thought. Yet when the ship reached California needing additional repairs, Merchant Marine did not seek an on-hire survey or any inspection or try to resolve the problems in any way. Looking at the record in this case, one simply cannot say that Merchant Marine exercised due diligence to provide a seaworthy vessel.

(21a-22a).

The District Court specifically based its ruling that Petitioner failed to exercise due diligence to make the vessel seaworthy on events that occurred "from the time the voyage began." Read in the context of the Court's findings of fact, "from" obviously means after and not including the beginning of the voyage. The Court found the first notice to Petitioner of the ship's deteriorating condition to be advice from the Master on November 24, 1989 about exhaust valve problems. (14a). The ship had departed from New Jersey nine days earlier on November 15, 1989. (C.A. App. 1379). Thus, Peti-

tioner was notified about a potentially unseaworthy condition for the first time nine days *after* the "beginning of the voyage."

### 2. Other Courts of Appeals Follow COGSA, as Written.

The decision below conflicts with the decisions of other Courts of Appeals in that it holds Petitioner liable under COGSA for failing to exercise due diligence to make the ship seaworthy *solely* on the basis of events occurring *after* commencement of the voyage. In the circuits where the issue has been addressed, the Courts have held that a carrier's duty under COGSA to exercise due diligence to make the ship seaworthy ends when the vessel "breaks ground" on the voyage, *Horn v. Cia de Navegacion Fruco*, 404 F.2d 422, 428 (5th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969); *Squillante & Zimmerman Sales, Inc. v. Puerto Rico Marine Management, Inc.*, 516 F. Supp. 1049, 1052 (D.P.R. 1981), *aff'd*, 685 F.2d 421 (1st Cir. 1982); *Sears, Roebuck & Co. v. American President Lines*, 345 F. Supp. 395, 404-405 (N.D. Ca. 1971), or, for a specific cargo, when that cargo is lifted. *In re Grace Lines, Inc.*, 517 F.2d 404, 407 (2d Cir. 1975); *Union Carbide & Carbon Corp. v. United States*, 200 F.2d 908, 910 (2d Cir. 1953).

In *Mississippi Shipping Co. v. Zander and Co.*, 270 F.2d 345, 349 (5th Cir.), *vacated as moot*, 361 U.S. 115 (1959), the Court of Appeals for the Fifth Circuit looked carefully at the time limitations inherent in Section 3(1) of COGSA. Noting the dual references, "before" and "at" the beginning of the voyage, Judge Brown wrote:

> That the duty reaches backward from commencement does not make it reach forward, as the Act prescribes that the latest point of performance is *at* the beginning. The voyage must have some place (and time) of beginning. After that, it is not the beginning, but the voyage itself which transpires."

270 F.2d at 349.

### 3. The Decision Below Destroys The Uniformity of Maritime Law and Encourages Forum Shopping.

The decision below holds Petitioner liable for failing to exercise due diligence to make the vessel seaworthy on account of Petitioner's failure to take action when advised of the deteriorating condition of the ship during the voyage. This ruling creates a new obligation under maritime law—the duty of a carrier to exercise due diligence to make the vessel seaworthy during the voyage—an obligation even more onerous where, as here, the carrier is a time charterer with no control over the maintenance and operation of the ship. Prior decisions uniformly have failed to recognize any such obligation, which is without a statutory basis.

This Court should grant the Petition and reverse the decision below to maintain the uniformity of interpretation of the requirements of Section 3(1) of COGSA. Otherwise, the ruling below is likely to cause much confusion among the international shipping community, since it places all "carriers" of goods by sea in foreign commerce to and from the states of New Jersey and Pennsylvania (at least) under an obligation to exercise due diligence to make the ship constantly seaworthy throughout every voyage. In the case of a charterer, as carrier, compliance with such a requirement would be impossible.

The Third Circuit's expansive interpretation of Section 3(1) of COGSA, unless overturned by this Court, will promote forum shopping. A shipper who suffers a loss as a result of an unseaworthy condition first arising after the beginning of the voyage and who accordingly would have no claim against the carrier in the First, Second, Fifth or Ninth Circuits, would be well advised to bring suit in New Jersey or Pennsylvania, if possible, where the rule of this case would be applicable.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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*Of Counsel*:

JOHN W. WALL
ELLEN M. FITZGERALD

Dated: July 10, 1995

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 94-5599

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HYUNDAI CORP., U.S.A.,
INCHON IRON & STEEL CO., LTD.,

—vs.—

THE HULL INSURANCE PROCEEDS OF THE M/V VULCA;
VULCAN NAVIGATION CORP.; HYUNDAI MERCHANT
MARINE CO., LTD.

HYUNDAI MERCHANT MARINE CO. LTD.,

*Third-party-Plaintiff,*

—vs.—

CLARENDON LIMITED,

*Third-party Defendant,*

Hyundai Merchant Marine Co., Ltd.,

*Appellant.*

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(D.C. Civil No. 90-01589)

District Judge: Honorable Harold A. Ackerman

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Appeal from the United States District Court
for the District of New Jersey

Submitted under Third Circuit LAR 34.1(a)
March 29, 1995

Before: MANSMANN, COWEN and LEWIS, *Circuit Judges*.

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JUDGMENT ORDER

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After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on September 9, 1994, be and is hereby AFFIRMED, substantially for the reasons set forth in the district court's opinion.

Costs taxed against the appellant.

By the court:

[illegible]
Circuit Judge

Attest:

[illegible]
Clerk
Date: April 11, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. Action No. 90-1589 (HAA)

Filed September 2, 1994

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HYUNDAI CORP., U.S.A., and
INCHON IRON & STEEL CO., LTD.,

*Plaintiffs*,

—v.—

THE HULL INSURANCE PROCEEDS OF
the M/V VULCA, and

VULCAN NAVIGATION MARINE CORP. and
HYUNDAI MERCHANT MARINE CO., LTD.,

*Defendants*

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ORDER

ACKERMAN, D.J.

This matter comes before the court after a bench trial held from March 29 through April 1, 1993, and this court, after considering the record created at trial, including the testimony and the admitted exhibits, and after reviewing the parties' post-trial submissions; and for the reasons expressed in a Trial Opinion issued this same day; and for good cause shown;

IT IS ON THIS 2nd day of September, 1994

ORDERED that judgment is entered for plaintiff against defendant Hyundai Merchant Marine Co. Ltd. in the amount of $5,085.220.52 plus interest.

/s/ HAROLD A. ACKERMAN
Harold A. Ackerman, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. Action No. 90-1589 (HAA)

Filed September 2, 1994

---

HYUNDAI CORP., U.S.A., and
INCHON IRON & STEEL CO., LTD.,

*Plaintiffs*,

—v.—

THE HULL INSURANCE PROCEEDS OF
the M/V VULCA, and

VULCAN NAVIGATION MARINE CORP. and
HYUNDAI MERCHANT MARINE CO., LTD.,

*Defendants*.

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## TRIAL OPINION

ACKERMAN, D.J.

This matter comes before the court after a bench trial held from March 29 through April 1, 1993. The parties subsequently submitted proposed findings of fact and conclusions of law.

The following constitutes my findings of fact and conclusions of law.

*I. Findings of Fact*

On October 5, 1989, defendant Hyundai Merchant Marine Co., Ltd. ("Merchant Marine") entered into a voyage charter party with a shipper called Clarendon Ltd ("Clarendon"). In this charter, Clarendon contracted to have Merchant Marine arrange for the shipment of Clarendon's cargo. The voyage charter specified that Clarendon would provide to Merchant Marine a cargo of scrap for the ship voyage.

The Voyage Charter Party provided (Merchant Marine is referred to as "owners" and Clarendon is referred to as "charterer"):

> Owners are to be responsible for loss of or damage to the goods . . . only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods . . . or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners of their Manager.

Under the provisions of the voyage charter party, Merchant Marine was to receive "Ninety percent (90%) of freight to be paid within five banking days after signing and releasing Bills of Lading marked 'Freight As Per Charter Party.'. . . " Thus, the payment of freight was tied to the issuance of a bill of lading under the charter party.

Clarendon eventually sold the cargo to Hyundai Corp. U.S.A. ("Hyundai) and negotiated the bill of lading that was issued for the voyage to Hyundai in accordance with a Sales Contract dated September 4, 1989 and in consideration of receipt of payment for the cargo in the amount of $5,085,220,52. Hyundai became the holder in due course of the bill of lading.

On October 6, 1989, Merchant Marine negotiated a time charter party with Vulcan Navigation Corporation ("Vulcan"), the owner of a ship called the Vulca, for the purpose of transporting the cargo of goods covered by the voyage charter between Merchant Marine and Clarendon. Under this time

charter, Merchant Marine contracted from Vulcan to use the Vulca for a particular period of time. As with most time charters, the shipowner—in this case Vulcan—retained possession and control of the ship during the chartering period. Clause 8 of the Time Charter between Vulcan and Hyundai provided that:

> "[T]he Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, discharge and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's and Tally Clerk's receipts."

Clause 61 provided that:

> "Master is to sign the Bills of Lading for cargo as presented in conformity with Mate's or Tally clerk's receipts. However, at Charterers' option, Charterers or their agents may sign Bills of Lading on behalf of the Master always in conformity with Mate's or Tally Clerk's receipts. All Bills of Lading shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities that may arise from any inconsistency between this Charter and any Bills of Lading signed by the Charterers' or their agent."

The charter parties each contained a Clause Paramount, a clause that states that bills of lading issued pursuant to the charter parties would be governed by the Carriage of Goods By Sea Act ("COGSA").

In November of 1989, Clarendon appointed Overseas Shipping, Inc., to serve as a port agent to issue a bill of lading for the cargo of scrap. On October 13, 1989, Merchant Marine also appointed Overseas as a port agent. It sent a telex to Overseas stating the following:

> We, Hyundai Merchant Marine Co. (Seoul), understand that you are supposed to act as agents on behalf of vsl/chtrs/owrs. VSL now proceeding to load port (Jersey City) for shipment of steel scrap . . . .

On November 5, 1989, the Master of the Vulca issued a notice authorizing "Overseas Shipping, Inc. to sign and issue bills of lading for the scrap metal cargo loaded, in accordance with all terms, conditions and exceptions of subject scrap charter party, and any addenda thereto."

In November of 1989, the Vulca arrived in Jersey City, New Jersey, prepared to carry the shipment of scrap from the United States to Inchon, South Korea. Pursuant to its authorization by the Master of the ship, a representative of Overseas signed the bill of lading on his behalf. The Bill of Lading actually was signed by Carolyn Comer, for "Overseas Shipping Inc., as Agents". Although she testified that she signed the bill of lading on behalf of the master, she also testified that she did not know who authorized the master to issue the Bill of Lading. The bill itself does not name the principal. Also, while including the language "all other terms, conditions and exceptions as per Charter Party", the bill of lading does not specifically refer to a Charter Party.

However, the surrounding circumstances outlined above make it clear that the bill of lading was issued pursuant to the voyage charter party.

Trial revealed conflicting testimony about the condition of the Vulca. The M/V Vulca was built in 1968, and therefore was 21 years old at the time of the relevant voyage. Prior to being named "Vulca", the vessel was known as the "Maraton". In light of the number of repairs made on the ship during the voyage, and the nature of the sinking (detailed below), and after listening to and reviewing the testimony and trial exhibits, I find credible the observations made by plaintiff's surveyor and expert.

In April, 1989, the Vulca (then called the Maraton) was anchored in the harbor of Ravenna, the dock in Uova Fruzzi, in Italy. The ship was in the court's custody because it was "laid up", that is, it was not seaworthy. A Dr. Giancarlo

Cortesi, an experienced and unbiased marine surveyor, conducted a court-ordered inspection of the ship on April 30, 1989, in part to determine whether the ship should be sold.[1] When he entered the main deck of the ship, he saw metal plates that were completely worn out. The plates were so thin that they contained holes. Therefore, welding would not have been possible. Efforts to cover up the holes were poor. His observations told him that "the ship was only good for scrap." Cortesi Deposition at 21, lines 20-21. He also testified that the ship was dangerous and that it would have cost about two million dollars to make it seaworthy.

Mr. Cortesi's testimony is corroborated by the testimony of Mr. Henk Van Hemmen, an expert in marine engineering, marine survey and maintenance and repairs in marine vessels. He testified, based on photographs of the ship and on Dr. Cortesi's report, that the ship was "heavily corroded and also deteriorated" and that "[t]his condition had reached an extent as to materially affect the structure and integrity of the vessel." Tr. 61. He further testified:

> "By what we see on these photographs, is not a matter of patching here and there but calls for substantial renewals which involves a great amount of money. When we see a situation like this, this is not a matter of patching or partially renewal correcting situations, frequently calls for major steel renewals." Tr. 61

Mr. Van Hemmen testified that it would have cost over $200 million to repair the ship.

Dr. Cortesi's testimony is additionally corroborated by a July 1988 inspection and report from the Port Authority to the Consulate of Argentina, which Mr. Cortesi reviewed and confirmed as his observations. Upon this survey the following defects were found:

> 1. Holding-down cleats of hatch covers broken or missing, wheels misaligned, serious problems with closure,

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[1] Dr. Cortesi has a degree in industrial engineering, and regularly has conducted surveys of ships on behalf of the court, or on behalf of insurance companies.

disconnections and defective tightness between sections of hatch covers, air vents in holds corroded and not tight, remarkable leakages of hydraulic oil in the opening/closing system of oleodynamic type, in general serious problems of weathertightness of hatch covers.

2. Main deck areas between holds remarkably corroded . . . with through holes in several places.

3. Internals of main deck between No. 1 hold and forecastle practically missing as a result of strong corrosion.

4. Coamings of hatches for access to holds corroded in a manner to allow sea water leakages.

5. Lower manholes of wing tanks without securing nuts and with many studs corroded or missing, currently held in place with cement.

6. Crack in way of connection between wing tank and hold in after part, such to allow leakage of water from tank to hold.

7. Coaming in way of access to C02 room on main deck corroded with through holes. . . .

This survey further stated that "[i]n view of the above findings, m/v "MARATON" will not be allowed to sail until defects found are eliminated. Shall advise outcome and date when defects eliminated."[2]

Mr. Cortesi also confirmed the observations of another surveyor, Captain Franco Giampieri, who surveyed the ship on November 15, 1988. Mr. Giampieri cited numerous examples of deterioration, including strongly corroding plates, corroding rust, and leaking in the holds. This report warned that "[i]t is therefore evident that under the current conditions the

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[2] Merchant Marine argues that since the evidence shows that the ship did in fact leave Ravenna, the repairs must have been done. The argument has some syllogistic appeal, but unfortunately is not supported by evidence.

ship is liable to fast process of deterioration entailing real damage."[3]

Merchant Marine tries to contradict the testimony by pointing out that a representative of Hyundai, Mr. Joeng Il Suh, went on board the vessel every day when the ship was anchored in New Jersey. Mr. Suh testified that he saw nothing unusual in the vessel and that everything appeared in normal condition. However, Mr. Suh made clear in his trial deposition that his obligation was to inspect the cargo, not to inspect the ship. As he put it: "I didn't pay my attention to the vessel. I just, I just pay my attention to the cargo. So that's why I didn't know, I didn't know what the vessel situation is, what the vessel condition is." Suh Deposition, pp. 5-6.

At some point, the ship left Italy and travelled to Piraeus, Greece. Here, the ship was subjected to an inspection and repairs were performed. Merchant Marine relies in large part on the inspection and repairs that were carried out in Piraeus. Indeed, Vasilios Karapanos conducted a survey on the ship on behalf of the Newcastle P&I Club, a classification society. Plaintiff's expert described the purpose of classification societies as follows:

> Classification societies are institutions established in the early twentieth century to give the shipowners a certificate which they could show to their underwriters, cargo underwriters, legal liability underwriters, charterers, stevedores. And that it was the task of the classification society is they have a rule book, a book which explains the rules and regulations for construction of ships.
>
> Besides that, they have a surveying system whereby the ships are surveyed at regular intervals afloat and on

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[3] Merchant Marine objects to these two reports on two grounds. First, it contends that they are hearsay. I ruled at trial, however, that since Mr. Cortesi relied on the reports, they were admissible. Merchant Marine then contends that the reports are irrelevant, since they took place in 1988. However, there is no evidence that the ship was repaired between April 1988 and November 1988 or April 1989. Therefore, the reports detail the ship as seen by Mr. Cortesi.

> dry dock and with safety equipment and structure arrangements whereby the people who use that certificate, that look at that certificate and it's somewhat of a document to put their mind at ease, somewhat of proof that this complies with the very minimum standards of classification. Tr., Van Hemmen deposition, p. 81.

A surveyor acting on behalf of a classification society generally boards the ship, reports on its condition, and recommends particular repairs. The club is made aware of the recommendations and also notified if the owner complies with the recommendations. If the shipowner refuses to comply, the surveyor notifies the club, which then makes its own decision whether to provide a class certificate.

Mr. Karapanos inspected the ship and recommended certain repairs. These recommendations were given to the owner of the vessel and reported to the P&I club. While Mr. Karapanos recommended several permanent repairs, on at least one occasion the Owner, with the approval of the P&I Club, only made temporary repairs. Although the estimated cost of repairs to make the ship seaworthy was about $2 million, the repairs actually performed amounted to only about $200,000.

In this regard, Mr. Van Hemmen—whose testimony I credit—stressed that with classification societies, the "emphasis [is] on minimum . . . requirements." Tr., Van Hemmen deposition at 83. Also, in the only testimony on the subject, Mr. Van Hemmen testified that underwriters do not always rely on classification societies: "At present we are in a situation where underwriters don't trust the classification societies and whereby they actively have their own underwriters carrying on inspections apart and besides the classification society inspections." *Id.* at 84-85 [4]

After the repairs were conducted in Piraeus, the vessel left and Merchant Marine became the time-chartered owner. Thus,

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[4] Merchant Marine argues that the court should disregard the testimony of Van Hemmen, because it is at odds with general knowledge in the industry—namely that underwriters do indeed rely on certificates from classification societies. The treatises cited by defendant do not really contradict Mr. Van Hemmen's testimony, though. One speaks to historical truth, the other speaks to the current situation.

from this point on, the charterer told the Master where to go and what cargo to load. The time charter also contained the following clauses:

> *Clause 40* Master to furnish Charterers between load and discharge ports with two copies of the log book abstract, both for deck and engine having to show vessel's daily average speed, course, force of wind, direction of wind, revolutions of engine and consumption of both fuel and diesel oil.
>
> *Clause 44* the Master to cable Charterers on sailing from each port, giving sailing date and time, quantity loaded according to draft of the vessel as well as manifested weights also E.T.A. and amendments during the voyage, if necessary. Wireless operator to listen always to SEOUL RADIO for possible Charterers' instructions, even when in roads or at anchorages or lagoons . . . .

Here, the ship's deck log and radio log tell different stories. The Deck Log indicated that the ship left Piraeus on October 10, 1989, bound for New Jersey. However, the Radio Log reports that the ship left port on October 13, 1989, and returned to port at 20:35, "due to engine trouble." According to the radio log, the ship finally proceeded to its New York area destination on October 14 at 18:05.

On October 19, 1989, the Deck Log sates that the Chief Officer was ill and that the ship therefore proceeded to Cadiz, Spain. It reports that the next day, the sick officer disembarked at Cadiz and the vessel left Cadiz the next day. The Radio Log mentions none of this.

The Radio Log indicates that the ship was experiencing strong vibrations from October 20 through October 24, and that numerous urgent messages were sent on October 25. The ship had to be deviated to Pointa Delgada, Azores, where it remained on October 25 and October 26.

It appears from the conflicting reports that the ship was experiencing difficulties during the period of the voyage. However, it does not appear that Merchant Marine was made aware of these difficulties.

The ship arrived at Claremont Terminal on November 5, 1989, three days late, and the loading of the scrap cargo began the next day. During the next several days, a total load of 35,017.3 tons of scrap was loaded on board the Vulca. While at Claremont Terminal, Merchant Marine's port captain, Captain Shin, attended to the vessel, seeing to the cargo. He received reports from Overseas as to the progress of the cargo loading.

S.K. Kang, who was assistant general manager of Hyundai Merchant Marine Company at the relevant time, testified that prior to the time when the shipment began to be loaded, the time charterer and the owner conducted a joint survey of the vessel. The survey was arranged for by Merchant Marine's port captain and its agent. Mr. Kang received a report on the results of the survey.

After leaving New Jersey and sailing towards the Panama Canal, the ship began experiencing more problems. On November 24, 1989, Merchant Marine was informed that "Vulca Master called to inform vessel unable to comply with transit canal scheduled for 0200/25th due to exhaust valve problems, therefore transit has been canceled." On November 26, Merchant Marine was informed that "Vulca presently performing repairs exhaust [sic] valve problems early ETD 19th/PM". On November 28, 1989, Merchant Marine was given the following ominous message:

> At 2020 hours Nov 24th, Master to called to inform us that vessel would not be able to commence transit at 0150 25th as scheduled due to what he described as exhaust valve repairs that were required. The following day, he informed that repairs would take approximately thirty six hours.
>
> The Owners had despatched spares that were to be delivered to the vessel passing Balboa, However these were delayed in arrival Panama and received only November 25th and delivered to the vessel in Cristobal.
>
> After the spares had been delivered we were then informed by the owners of the vessel that two techni-

> cians would be coming in from Houston, and after delays in their schedule, they finally arrived on Monday. In the meantime the master informed us that after their arrival the repairs would take about 1.5 or two days.
>
> This morning the master stated that the repairsh [sic] 3 or four days more.
>
> The master has been very evasive when we have asked exactly when the problem occurred, stating only that it was after change in crew when an inspection was made. We feel that the vessel has main engine damage which for reasons best known to owners they do not want to divulge.
>
> The spares that we delivered were very heavy and probably contained spare bearings sent by the technicians shop in Houston. Another spare was sent from Alfa Laval which is probably something to do with the lube oil system, so these facts coupled with the departure of the chief engineer and a large requisition for lube oil supplies makes us think that the damage has nothing to do with the exhaust valve as the master has stated.
>
> We have reported to you exactly what the master has stated, and the delays that have occurred since the original estimate can only mean that the damage is more severe than originally thought.

Indeed, the deck log supports the fact that the ship was experiencing problems. On November 25, the ship began undergoing repairs. Two days later, a boat with tools arrived. Two more days later, two repairmen from Greece boarded. On November 29, engine items were forwarded for reconditioning.

On December 1, 1989 the ship was ready for transit through the Panama Canal. On December 11, 1989, the Vulca left the Panama Canal to travel to California. During the course of the voyage, the ship was stopped at sea for five days due to engine problems and necessary repairs that had to be done.

The ship eventually reached Long Beach, California, en route to Korea. There, two engine technicians arrived from

Houston and boarded the vessel to conduct repairs. While in California, Captain Tejada, an employee of Merchant Marine, boarded the ship and assisted in arranging for bunkering as well as coordinating with the Coast Guard for permission for the ship to conduct additional engine repairs. He also arranged for spare parts to be delivered to the Vulca. No inspection of the Vulca was carried out.

On December 22, 1989, the ship began sailing from Long Beach to Inchon, South Korea. From that day onward—until the ship sank—the weather was expectable for the voyage as well as for the time of the season. On December 25, however, the Master noted in the log that the ship was "down by head". The forepeak tank and No. 1 hold had taken on water, and the crew experienced difficulty in pumping out the water. In the next few days, water was discovered in various other parts of the ship. On December 28, the ship began experiencing steering motor problems and engine trouble. On December 29, United States Coast Guard portable gas pumps were received and pumping commenced. Two days later the ship sank.

Plaintiff's expert testified that the ship sank because of progressive flooding. That is, the ship began to take water in various compartments, each of which was supposed to be watertight. Additionally, the logs and coast guard records reveal the following: (1) the Vulca had requested divers for underwater weld to repair a crack in the hull and to be towed to Honolulu; (2) the bulkheads, designed to keep water from leaking from one tank into the next, were unable to stem the flooding; (3) the ship was experiencing engine trouble and was not steering well; and (4) the ship's pumps were not working properly.

The entire cargo was lost (though there were no casualties), and plaintiff suffered a loss of $5,085.220.52

*II. Conclusions of Law*

A contract for carriage of goods by sea to or from United States ports can be in the form of private carriage or a form of public carriage. When a carrier contracts with the general public for shipping, the contract is considered public carriage,

and all bills of lading issued under such arrangements are governed by the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq. ("COGSA"). When the contract is in the form of a charter between the carrier and the shipper, the contract generally is considered private carriage, and COGSA does not apply. However, through a maritime charter party, the owner and charterer (or the charterer and sub-charterer) can stipulate through a contractual provision known as a "Clause Paramount" that COGSA applies to bills of lading issued pursuant to the charter party. Both charter parties at issue in this case contained Clauses Paramount, providing that COGSA would govern the bills of lading issued pursuant to those charter parties.

In this case, the initial question is whether COGSA applies. This requires the court to determine whether (1) the bill of lading incorporated the clause paramount of the charter parties; and (2) whether Merchant Marine can be held liable as a COGSA carrier. If a party can be shown to have issued a bill of lading that is covered by COGSA, that party is a COGSA carrier. But in the alternative, even if the defendant is not a party to the bill of lading, that party may still be a carrier under COGSA if the plaintiff shows that the defendant was involved in some significant way in the issuance of the bill of lading or the loading of cargo and the plaintiff demonstrates that the defendant's actions contributed to the lost cargo.

In the instant case, both charter parties contain clauses stating that bills of lading issued pursuant to the charter party are governed by COGSA. Merchant Marine argues that the bill of lading is not specific enough to refer to or incorporate either charter party. While the bill of lading does not specifically refer to either charter party, it clearly arises out of the voyage charter party between Merchant Marine and Clarendon. It is a bill of lading providing for the carriage of scrap that is the subject of the charter. It provides for discharge at a particular rate "as per CHARTER PARTY" and contains the language "all other terms, conditions and exceptions as per charter party" and "freight payable as per Charter Party". Moreover, the master's direction to Overseas authorized the latter "[t]o

sign and issue bills of lading for the scrap metal cargo loaded, in accordance with all terms, conditions and exceptions of subject scrap charter party." Thus, I find that the bill of lading incorporates the clause paramount of the charter party and COGSA governs the relationships of the parties to the bill of lading.

Thus, the question becomes whether Merchant Marine issued the bill of lading or can be held to the bill. While it is true that the bill of lading was not specifically signed by a representative of Merchant Marine, and certainly the bill is not on Merchant Marine's form, the following facts also came out at trial:

(1) Overseas was acting as Merchant Marine's agent at the port, though the scope of the agency relationship is not definite. Moreover Carolyn Comer, the Overseas representative, did not know on whose behalf the master signed the bill of lading;

(2) Clarendon did enter into a voyage charter party with Merchant Marine, and thus, the contract upon which the bill of lading was based was really with Merchant Marine;

(3) As found above, the bill of lading referenced and incorporated the voyage charter party;

(4) Payment of freight pursuant to the voyage party was contingent upon a bill of lading issued for the cargo;

(5) The Voyage Charter, by providing that "Ninety Percent (90%) of freight to be paid within 5 banking days after signing and releasing Bills of Lading Marked 'freight Paid as Per Charter Party' . . . ." "made provision for the possibility that [Merchant Marine] would authorize the bills of lading by signing or releasing them." *Samsung America Inc. v. M/T Fort Producer*, 798 F. Supp. 184, 187 (S.D.N.Y. 1992).

(6) Merchant Marine's port captain in New Jersey saw to the loading of the cargo, and in fact Merchant Marine continued monitoring and receiving reports about the transport of the cargo after the ship left New Jersey;

All these factors point to one conclusion: there is much evidence "tying [Merchant Marine] to the bill involved." *Joo Seng Hong Kong Co. Ltd. v. S.S. Unibulkfir*, 483 F. Supp. 43, 46 (S.D.N.Y. 1979); *Samsung*, 798 F. Supp. at 187. In other words, the evidence convinces me that Merchant Marine authorized the bill of lading. Alternatively, Merchant Marine was so tied to the issuance of the bill of lading and the cargo voyage that under the practical considerations outlined by this court in its decision on the defendant's summary judgment, it would be inequitable to find Merchant Marine not liable on the bill of lading.

Therefore, I find that because of Merchant Marine's involvement in the contract of carriage, it is a COGSA carrier and is subject to the concomitant rights and responsibilities.

Once a party is held to be a COGSA carrier, federal law provides that:

> [U]nder every contract of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

46 U.S.C. § 1302. Sections 1303 and 1304 provide that a carrier shall be bound to make the ship seaworthy; properly man, equip and supply the ship; and properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. A carrier may also be liable if it is shown that it did not use due diligence in preparing the ship for the voyage.

In order for the carrier to be liable, Hyundai must first make out a prima facie case. This is done by proving that the goods were delivered to the carrier in good condition and were lost. There is no dispute about these facts. The goods were certainly delivered in good condition, and the ship certainly sank with the cargo.

Additionally, the circumstances of this case bring into play certain presumptions. A vessel is presumed to be unseaworthy when it sinks in expectable weather conditions. *Feder-*

*azione Italiana dei Cors. A. v. Mandask Compania de V.*, 388 F.2d 434, 436 (2d. Cir.), *cert. denied*, 379 U.S. 930 (1968). Furthermore, when a vessel sinks in expectable weather conditions and the plaintiff proves some element of unseaworthiness, an inference is drawn that unseaworthiness is the proximate cause of the loss. *Walston v. Lambertsen*, 349 F.2d 660, 662 (9th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966). As the Second Circuit has held:

> It is not disputed that the cargo was delivered to the carrier in good order and that subsequently it was entirely lost when the ship sank in fair weather and calm seas. Under these circumstances it is presumed that the loss was occasioned by the unseaworthiness of the [ship]. *Federazione Italiana dei Cors. A. v. Mandask Compania de V*, 388 F.2d 434, 436 (2d Cir. 1968) (citing cases).

The undisputed testimony indicates that the weather conditions in the Pacific Ocean at the time of the sinking were normal and expectable. Moreover, credible testimony demonstrated that at the time of sinking the ship was in a deteriorating condition, after having recently undergone repairs totally insufficient to remedy the "dangerous" nature of the vessel.

Thus, in this case, there is a combination of sinking during expectable weather conditions and a series of factors independently evidencing unseaworthiness. Presumptively, then, Merchant Marine provided Hyundai with an unseaworthy vessel and the unseaworthiness was the proximate cause of the loss.

In order to rebut this presumption, the carrier has the burden of proving that it exercised due diligence to make the ship seaworthy. See 46 U.S.C. § 1304; *Federazione*, 388 F.2d at 436. Merchant Marine attempts to rebut the presumption by pointing to the survey in Greece and the class certification. However, the carrier cannot meet this burden merely by producing certificates of classification. *Ionion Steamship Co. of Athens v. United Distillers*, 236 F.2d 78, 83 (5th Cir. 1956). Classification societies do not guaranty the seaworthiness of

the ships that they classify. *Carbotrade SpA v. Bureau Veritas*, 1992 WL 367122 at *7 (S.D.N.Y. November 20, 1992). The duty of a classification society is merely to abide by their own rules and regulations in inspecting and classifying vessels in accordance with their own published standards. *Id.* Thus, the survey that led to the class certification is insufficient as a matter of law to rebut the presumption as well as the evidence of unseaworthiness adduced at trial.

Merchant Marine next argues that the Owner of the ship was in-charge of maintenance of the ship. In *Hasbro Industries Inc. v. M.S. St. Constantine*, 705 F.2d 339, 342-43 (9th Cir. 1983), the Ninth Circuit affirmed the district judge's conclusion that the time charterers did all that could be expected of diligent time charterers. In that case, the time charterers:

> mandat[ed] within the charterparty 1) that the vessel and crew be classified in the highest classification provided by Det Norske Veritas, an internationally recognized classification society; (2) that the vessel comply with all applicable provisions of the Safety of Life at Sea Convention (SOLAS); and (3) that numerous on-hire and class surveys and inspections be performed as pre-requisites to their continued use of the St. Constantine and relationship with the St. Constantine Maritime Co., Ltd. *Id.*

Unlike the time charterer in that case, Merchant Marine cannot represent that it did all it could do as a time charterer. To be sure, it provided that the vessel would be maintained in class and classed with a recognized classification society. Moreover, the vessel was registered in countries which required adherence to SOLAS. However, from the time the voyage began, Merchant Marine was repeatedly apprised of the deteriorating condition of the ship. In one rather ominous report, Merchant Marine was told that the master was giving evasive responses to inquiries about the ship's condition and that the problems appear more serious than previously thought. Yet when the ship reached California needing additional repairs, Merchant Marine did not seek an on-hire sur-

vey or any inspection or try to resolve the problems in any way. Looking at the record in this case, one simply cannot say that Merchant Marine exercised due diligence to provide a seaworthy vessel.

It is true that when all is said and done, the evidence linking the unseaworthiness of the vessel to the cause of the sinking is partly circumstancial. But it is plausible that when a dangerous vessel sinks in expectable weather conditions, the dangerous vessel was a proximate cause of the sinking. That is what the presumption is about. And Merchant Marine has not rebutted it with any evidence that the ship sank for some other reason.

## CONCLUSION

Therefore, for the reasons detailed above, I find that Merchant Marine is a COGSA carrier who is liable to plaintiff for the cargo delivered on the Vulca. Merchant Marine is liable to plaintiffs for damages in the amount of $5,085.220.52 plus interest.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. Action No. 90-1589 (HAA)

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HYUNDAI CORP., U.S.A., and
INCHON IRON & STEEL CO., LTD.,

*Plaintiffs*,

—v.—

THE HULL INSURANCE PROCEEDS OF
the M/V VULCA, and

VULCAN NAVIGATION MARINE CORP. and
HYUNDAI MERCHANT MARINE CO., LTD.,

*Defendants*

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ORDER

ACKERMAN, D.J.

This matter having come before the court upon a motion by defendant Hyundai Merchant Marine Co., Ltd., for summary judgment pursuant to Fed.R.Civ.P. 56(b), and the court having fully considered the record before it and the oral argument of August 5, 1992; and for good cause shown; and for the reasons expressed in my opinion of this day;

IT IS ON THIS 8TH DAY OF AUGUST, 1992,

ORDERED that defendant's motion for summary judgment is denied.

/s/ HAROLD A. ACKERMAN
Harold A. Ackerman, U.S.D.J.

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OPINION

ACKERMAN, D.J.

On December 31, the M/V Vulca ("Vulca"), on sail from New Jersey-to South Korea, sank in the Pacific Ocean approximately 700 miles northeast of Hawaii. The sinking resulted in the complete loss of all cargo on the ship, and this cause of action springs from that loss. Currently before the court is a motion by defendant Hyundai Merchant Marine Co. ("Merchant Marine") for summary judgment pursuant to Fed.R.Civ.P. 56(b). Merchant Marine argues that it is not liable to plaintiffs for damages resulting from the lost cargo.

*I. Standard for Summary Judgment*

Summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See Todaro v. Bowman, 872 F.2d 43, 46 (3rd Cir. 1989); Chippolini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3rd Cir.), cert. dism'd, 483 U.S. 1052 (1987). Put differently, "summary judgment may be granted if the movant shows that there exists no genuine issues of material fact that would permit a reasonable jury to find for the nonmoving party." Miller v. Indiana Hospital, 843 F.2d 139, 143 (3rd Cir. 1988), cert. denied, 488 U.S. 870 (1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-48 (1986). A fact is material if it influences the outcome under the governing law. Id. at 248.

Within the framework set out above, the moving party essentially bears two burdens: First, there is the burden of production, of making a prima facie showing that it is entitled to summary judgment. This may be done either by demonstrating there is no genuine issue of fact and that as a matter of law, the moving party must prevail or by demonstrating the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. Once either showing is made, this burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden as well as establish the existence of genuine issues of material fact. Second, there is the burden of persuasion. This burden is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted. See Celotex Corp. v. Catrett, 477 U.S. 317, 330-33; Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-61 (1970); Advisory Committee's Notes on Fed. Rule of Civ. Pro. 56(e), 1963 Amendment; see generally C. Wright, A.

Miller, & M. Kane, Federal Practice and Procedure §2727 (2nd ed. 1983).

*II. Background*

In the shipping industry, a party wishing to ship cargo from one point to another is a shipper, and the party that contracts to transport the goods—usually the shipowner—is the carrier. Often, a shipper will have enough cargo to fill an entire vessel. In this case, the shipper may charter a vessel from the shipowner. A charter agreement is termed a "charter party" and constitutes "a specialized type of maritime contract for the hire of a vessel." Thomas J. Schoenbaum, Admiralty and Maritime Law 381 (1987). Charter parties come in three forms. In a demise charter, the charterer takes full control of the vessel for a certain period of time, controlling its schedule as well as providing the crew and navigation. A time charter, on the other hand, involves the charterer controlling the voyages for a specific time period while the shipowner retains possession of the ship and responsibility for the navigation. In a voyage charter, the charterer contracts to use the ship not for a particular period of time but for a particular voyage. In both time charters and voyage charters, the charterer generally uses the entire ship to ship its cargo. However, unless the charter provides otherwise, a charterer may subcharter the vessel. For example, a time charterer, when not using the entire ship, may contract for a voyage charter party with another shipper. When a carrier loads a shipper's goods on the vessel, the carrier or its agent issues and signs a bill of lading. A bill of lading not only acknowledges the receipt of cargo but also provides a contract of carriage between the shipper of cargo and the carrier of the cargo.

In this case, the undisputed facts disclose the following scenario:

On October 5, 1989, defendant Merchant Marine entered into a voyage charter party with a shipper called Clarendon Ltd. In this charter, Clarendon contracted to have Merchant Marine arrange for the shipment of Clarendon's cargo. The

voyage charter specified that Clarendon would provide to Merchant Marine a cargo of scrap for a ship voyage.

The Voyage Charter Party provided (Merchant Marine is referred to as "owners" and Clarendon is referred to as "charterer"):

> Owners are to be responsible for loss of or damage to the goods . . . only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods . . . or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the person act or default of the Owners of their Manager.

On October 6, 1989, Merchant Marine negotiated a time charter party with Vulcan Navigation Corporation ("Vulcan"), the owner of a ship called the Vulca, for the purpose of transporting the cargo of goods covered by the voyage charter between Merchant Marine and Clarendon. Under this time charter, Merchant Marine contracted from Vulcan to use the Vulca for a particular period of time. As with most time charters, the shipowner—in this case Vulcan—retained possession and control of the ship during the chartering period. The time charter in this case provided that:

> The Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment and agency; and Charterers are to load, stow, discharge and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading. . . .
>
> However, at Charterer's option, Charterers or their agents may sign Bills of Lading on behalf of the Master . . . . [T]he Charterers shall indemnify the Owners against all consequences or liabilities that may arise inconsistency between this Charter and any Bills of Lading signed by the Charterers or their agent."

In November of 1989, Clarendon nominated Overseas Shipping, Inc., to serve as a port agent to issue a bill of lading for the cargo of scrap. On November 5, 1989, the Master of the Vulca issued a notice authorizing "Overseas Shipping, Inc" to sign and issue bills of lading for Clarendon's scrap metal cargo. The bill of lading was issued to Clarendon, but subsequently was negotiated to plaintiff Hyundai Corporation, U.S.A. ("Hyundai"), when the cargo of scrap was sold by Clarendon to Hyundai.[1]

In November of 1989, the Vulca arrived in Jersey City, New Jersey, prepared to carry the shipment of scrap from the United States to Inchon, South Korea. Pursuant to its authorization by the Master of the ship, a representative of Overseas signed the bill of lading on behalf of the Master (captain) of the Vulca. While the Overseas representative signed an affidavit that she "[did] not know who authorized the Master to issue said instructions" and that she "had received no specific instructions from either Hyundai Merchant Marine Co., Ltd. or Vulcan Navigation Corp.", the Master of the ship stated in a deposition that he recalled acting only for the shipowner.

The Vulca sailed from New Jersey on November 15, 1989, first proceeding to the Panama Canal. At the Canal, the Vulca was delayed for repairs. After the repairs were made, the ship sailed to Long Beach, California. In Long Beach, the ship underwent additional repairs. Finally, on December 22, 1989, the ship left California for the last leg of its voyage to Korea. On December 31, 1989, the Vulca sank approximately 700 miles northeast of Hawaii.

With the cargo lost, Hyundai and Inchon Iron & Steel, the cargo underwriter, brought this action against the shipowner Vulcan and the time charterer Merchant Marine for recovery of damages due to the lost cargo. A default judgment eventually was issued against Vulcan.

Now before the court is a motion for summary judgment by defendant Merchant Marine. Merchant Marine argues that

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[1] Unless specifically stated on the bill of lading, a bill of lading is assignable.

since it did not authorize the bill of lading covering the lost cargo, and since it did not commit any acts resulting in the loss of the cargo, it cannot, as a matter of law, be held liable for the damages.

*III. Discussion*

A contract for carriage of goods by sea to or from United States ports can be in the form of private carriage or a form of public carriage. When a carrier contracts with the general public for shipping, the contract is considered public carriage, and all bills of lading issued under such arrangements are governed by the Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq. ( "COGSA" ) . When the contract is in the form of a charter between the carrier and the shipper, the contract generally is considered private carriage, and COGSA does not apply. However, through a maritime charter party, the owner and charterer (or the charterer and sub-charterer) can stipulate through a contractual provision known as a "Clause Paramount" that COGSA applies to bills of lading issued pursuant to the charter parties. Both charter parties at issue in this case contained Clauses Paramount, providing that COGSA would govern the bills of lading issued pursuant to those charter parties.

Once the parties have stipulated that the bills of lading issued pursuant to the charter party are contracts of carriage of goods by sea governed by COGSA, federal law provides that:

> [U]nder every contract of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

46 U.S.C. § 1302. Sections 1303 and 1304 provide that a carrier shall be bound to make the ship seaworthy; properly man, equip and supply the ship; and properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods

carried. A carrier may also be liable if it is shown that it did not use due diligence in preparing the ship for the voyage. Thus, the threshold issue in this case is whether Merchant Marine is a COGSA carrier.

In 1979, while writing a seminal opinion in the area of shipping law, Judge Sand noted that "[t]he case law interpreting COGSA provides surprisingly little guidance on the question of who is properly characterized as a carrier for COGSA purposes or on the factors to be considered in making such a determination." Joo Seng Hong Kong v. S.S. Unibulkfir, 483 F.Supp. 43, 45 (S.D.N.Y. 1979) (hereinafter "*Joo Seng*"). Thirteen years later, this is still the case. Therefore, a brief discussion of the principles behind, and the application of, COGSA is appropriate.

COGSA was enacted because of the confusion about who was liable in the event of a cargo shipment lost at sea. COGSA attempted to provide shippers a broad array of defendants to sue in the event of a lost shipment of cargo: Defendants who are considered "carriers" are liable under COGSA. Thus, the crucial question in determining liability under COGSA has always been whether a particular defendant—usually a time or voyage charterer—is a COGSA carrier.

Traditionally, courts used agency law principles to determine who the carrier was. To determine the carrier, courts engaged in an analysis designed to determine who issued the bill of lading. Once it was shown that a party issued a bill of lading, that party became a carrier under COGSA and was held liable accordingly. The courts used a variety of factors to determine who issued the bill of lading, including the type of charter, who signed the bill of lading, whose form was used in the bill of lading, and under whose authority the bill of lading was issued. *Joo Seng* at 45-46; United Nations Childrens Fund v. S.S. Nordstern, 251 F.Supp. 833 (S.D.N.Y. 1965). This traditional rule has tended to assume that in any given contract for carriage of goods by sea, there can be only one COGSA carrier. Under this test, the shipowner has almost always been held liable, and the time charterer frequently has

been found not to have issued the bill of lading. I will call this test the "agency test."

More recently, however, some courts have determined that this agency approach is out of step with the policies of COGSA, which was meant to provide a broad class of defendants for shippers to sue when its cargo is lost or destroyed. This approach began to look not only at who issued or authorized the bill of lading but also at who actually was involved in the shipping contract. As Judge Sand described this approach in *Joo Seng:*

> Although decisions [traditionally sought] to justify the imposition of COGSA liability by finding specific evidence of a "contract of carriage" between the charterer or owner and the cargo interest involved, there is strong statutory support for treating . . . all owners and charterers involved in the carriage of the goods at issue as COGSA carriers who are potentially liable to cargo interests under the bill of lading.

*Joo Seng* at 46. Judge Sand continued: "[T]he statutory language of COGSA itself supports a broad definition of the term "carrier." The statute seems to have been deliberately drawn so as not to limit the term to a party to the bill of lading or the contract of carriage." *Id.* at 46.[2]

This "practical" approach had achieved acclaim among commentators. As Professor Schoenbaum has stated, the practical approach comports with the practices of the shipping industry:

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[2] Merchant Marine contends that Judge Sand modified his holding in a subsequent case. In that later case, the judge noted that "[e]ven if [the time charterer] was not involved with the issuing of the bills of lading, it may be liable to plaintiff if its agents in fact negligently supervised the cargo operations." Joo Seng Hong Kong Co., Ltd v. SS. Unibulkfir, 493 F.Supp. 35, 40 (S.D.N.Y. 1980). Apparently, Merchant Marine thinks that under this holding, summary judgment should be denied absent a showing that the time charterer committed negligence. Judge Sand's statement, though, pertains only to ultimate liability, not to a standard for summary judgment. In that case, the judge did not dismiss the time charterer because it may have been ultimately liable.

> The identification of the carrier issue comes up primarily as a threshold problem of who can be sued on the bill of lading by cargo interests. Agency principles are inappropriate to resolve the matter at this stage. The tangle of relationships between the parties is unclear, and the bill of lading was no doubt issued without significant negotiations between the shipper and any other party. The doctrine that all parties involved in the carriage of the goods are COGSA carriers eliminates the initial skirmishing over the identity of the carrier issue and brings all relevant parties before the court where the ultimate allocation of responsibility for the loss can be ascertained.

*Schoenbaum, Admiralty and Maritime Law* at 313. While this broad approach may be the most practical, though, other courts have felt that while agency principles may be too narrow for application to the shipping industry, the *Joo Seng* approach may be too liberal. For example, Judge Sofaer, when sitting as a judge in the Southern District of New York, modified the practical approach to place at least some initial burden upon the shipper. Directly addressing *Joo Seng*, he argued as follows:

> While it may usually make sense to deem a charterer a COGSA Carrier despite non-involvement in issuance of the bill of lading, that should only be so where there is some evidence that the time charterer might be ultimately liable to the plaintiff as a result of participation in the loading, handling or stowage of goods.

Agroexport & B.U.O. Assurance International, Ltd. v. S.S. Gordanka Nikolova, 1983 A.M.C. 1219 (S.D.N.Y. 1983). In that case, Judge Sofaer found that:

> When plaintiff alleged damage caused by a defective hatch cover, and where [the time charterer] established that it had nothing to do with [that defect or] with any aspects of the ship's operation, the policy of COGSA to create a broad class of defendants for cargo plaintiffs to sue must give way to the need to protect from further

> participation in cargo litigation parties with no involvement in either the bill of lading or the conduct alleged to have caused the cargo loss.

*Id.* I do not find the *Joo Seng* decision and the *Agroexport* decisions to be in conflict. Rather, Judge Sofaer was simply noting that the policies behind COGSA do not immunize a plaintiff for the minimal obligation under the Federal Rules of Civil Procedure to state a claim upon which relief can be granted.

Both the agency approach and the practical approach provide legitimate grounds for imposing liability. Clearly, if a party can be shown to have issued a bill of lading that is covered by COGSA, that party should bear liability as a COGSA carrier. But in the alternative, even if the defendant is not a party to the bill of lading, that party may still be a carrier under COGSA if the plaintiff shows that the defendant was involved in some way in the issuance of the bill of lading or the loading of cargo and the plaintiff makes a minimal showing that the defendant's actions contributed to the lost cargo.

I will analyze these in turn.

### *A. The Agency Test*

Hyundai contends that Merchant Marine authorized the bill of lading and hence is liable as a COGSA carrier. To assess whether there is a dispute over this material fact, I must analyze the bill of lading in light of the factors noted above.

The first factor asks what type of charter is at issue. Under traditional principles, if the charter is a demise—that is, if the owner relinquished all navigational duties to the charterer—the charterer will be held to be a COGSA carrier. But if the charter is a time charter, and the owner retained responsibility for navigation and loading, the owner generally was determined to be the carrier.

In this case, however, both the time charterer and the owner were authorized to issue bills of lading on behalf of the Vulca. Thus, without more, this factor is dispositive of nothing.

The second factor is: who signed the bill of lading. The bill of lading was signed by a representative of Overseas Shipping, Inc., a port agent nominated by Clarendon, and authorized to sign bills of lading on behalf of the master of the ship. Since the master could have gained authorization to issue bills of lading from both the owner and the time charterer, this factor, without more, also is dispositive of nothing.

The third factor asks on whose form the bill of lading was issued. Generally, when a carrier issues and signs bills of lading, it uses its own forms. In this case, it is undisputed that the bill of lading was not issued on Merchant Marine's form. But it was not issued on Vulcan's form either. Merchant Marine's contention that this factor weighs in its favor, then, is disingenuous. The form only raises the question of who authorized the bill of lading to be issued.

This question brings us to the last and most important factor—who authorized the bill of lading. Although the bill of lading states that it incorporates the provisions of the "charter party", this provision does not automatically apply all the provisions of the charter party between Merchant Marine and Clarendon to the holder of the bill of lading. Rather, as one court has stated:

> The charter party contract and the bill of lading are two separate and distinct integrated contracts, and . . . the mere statement in the bill of lading that it was 'subject to all terms, conditions' of the charter party contract . . . could not have the effect of obligating [a party to the charter] to perform the obligations of the parties to the charter party [to the holder of the bill of lading].

294 F.Supp. 200 (S.D.N.Y. 1968). Thus, there must be something more than the existence of the charter parties to show that Merchant Marine issued the Bill of Lading.

Merchant Marine makes several arguments designed to show that it did not authorize the bill of lading. First, it notes that Carolyn Comer, the manager of Overseas Shipping who signed the bill of lading for the November 1989 Vulca shipment, claimed in an affidavit that she was not authorized by

Merchant Marine to issue the bill of lading. In her May 12, 1992 affidavit, Ms. Comer stated that:

> Overseas Shipping, Inc. did not receive any authorization from Hyundai Merchant Marine Co., Ltd. to sign or issue any bills of lading on its behalf in connection with the cargo loaded on board the M/V Vulca . . . I signed the bill of lading marked "C" only on behalf of the master pursuant to the authorization given by him. My understanding was that his authorization to sign and issue bills of lading was given by him on behalf of the owner of the vessel and not on behalf of Hyundai Merchant Marine Co., Ltd. who is only the time charterer of the vessel. . . . The bill of lading form used did not name Hyundai Merchant Marine Co., Ltd. anywhere on it and, when I signed the bill of lading I was not acting for Hyundai Merchant Marine Co., Ltd.

Persuasive as this may seem, on July 8, 1992, Ms. Comer clarified her May statement. In her revised affidavit, she stated:

> I signed the bill of lading pursuant to the authority of the Master of the M/V Vulca. I had no further instructions from any other party. I do not know who authorized the Master to issue said instructions. I had received no specific instructions from either Hyundai Merchant Marine Co. or Vulcan Navigation Corp.

Merchant Marine wishes the court to find that "Ms. Comer made clear that her understanding was that the authorization given Overseas by the master was on behalf of the owner of the vessel and not on behalf of Hyundai Merchant Marine Co., Ltd." I decline to so find. Rather, the only fact that can be gleaned as a matter of law from Ms. Comer's statements is that Overseas received authorization to issue the bill of lading from the master of the ship.

Next, Merchant Marine cites a certification by the master and captain of the Vulca. Captain Petros Kefalas stated in his certification of June 10, 1992 that:

> Any bill of lading signed or issued by Overseas Shipping, Inc. under that authorization were solely on my behalf as master of the M/V Vulca and for her owners. . . . I do not recall receiving any authorization from the charterer, Hyundai Merchant Marine, Co., Ltd. to sign or issue bills of lading on behalf of that company or authorizing anyone to sign or issue bills of lading on behalf of Hyundai Merchant Marine., Ltd.

The first sentence of this quote says only that Captain Kefalas was acting in his authority as master of the ship and by signing bills of lading intended to bind the owner of the ship. There is no question, however, that Vulcan would be liable under the bill of lading; in fact, a default judgment already has been issued against it. The question, though, is whether the master also could sign or issue bills of lading on behalf of Merchant Marine. In this regard, the master stated only that he did not recall receiving any authorization from merchant Marine. But the Charter Party between Vulcan and Merchant Marine clearly authorized Merchant Marine, at its own option, to issue bills of lading, and also placed the master at the control of the time charterer. It is up to the factfinder to weigh these facts against Mr. Kefalas' "recollection". It is not a job for the court at this point in the litigation.

Merchant Marine then refers to the affidavit of Captain Yong Ho Shin, allegedly the sole Merchant Marine representative authorized to issue bills of lading on the east coast of the United States for scrap cargos. In his affidavit, Captain Shin states:

> The bill of lading . . . was not signed for Hyundai Merchant Marine Co., Ltd. or issued on its behalf . . . . [I] did not give any authority to sign or issue bills of lading for or on behalf of Hyundai Merchant Marine Co., Ltd. for the cargo or scrap loaded on the M/V Vulca in November of 1989 to Overseas Shipping Inc., the Master of the M/V/Vulca, or anyone else.

If this statement was uncontradicted anywhere in the record, it would be entitled to great weight. However, the

record also contains the deposition of S.K. Kang, assistant general manager of Merchant Marine (who was in charge of and familiar with the charters with the Vulca), which may be read to contradict Captain Shin's certification. In his deposition, Mr. Kang states that he sent a telex to Overseas authorizing Overseas to act on behalf of the "vessel charter members", which included "Hyundai [Merchant Marine], owners W LCA . . . ." Further, Mr. Kang notes that Overseas sent Merchant Marine a bill for dealings related to the shipment of steel scrap from Jersey City. While Mr. Kang also testified that Merchant Marine did not authorize Overseas Shipping to sign the bill of lading issued for this cargo, the record contains sufficient seemingly contradictory statements to allow the matter to proceed to the trial stage.

Therefore, I decline to find as a matter of law that Merchant Marine did not issue the bill of lading.

*B. The Practical Test*

Even if Hyundai is unable to establish that Merchant Marine authorized the bill of lading, it may establish that Merchant Marine is a COGSA carrier by showing that Merchant Marine (1) was involved in the transportation of the relevant cargo; and (2) engaged in actions that wound up causing the loss of cargo. Hyundai clearly passes this test.

As noted above, in most shipping contracts, the relationships between the parties are unclear and the relevant agreements are negotiated quickly and formalistically. If the plaintiff established that the time charterer is somehow related to the voyage, it makes more sense for a court to deny a motion for summary judgment, allow the matter to proceed to trial, and apportion liability at the damages stage. This policy, and the policy of COGSA to provide shippers a broad array of defendants to sue, applies in this case. The record displays the existence of a tangled web of relationships between the relevant parties. And by citing the testimony of Mr. Kang, by establishing that Hyundai was the time charterer of the Vulca, and by showing a voyage charter relationship between Clarendon (who ultimately sold the cargo and nego-

tiated the bill of lading to Hyundai) and Merchant Marine for the sole purpose of carrying Clarendon's cargo, Hyundai has shown that Merchant Marine was involved in the instant voyage. Merchant Marine claims it was only a middle man. This may be true, but that is a question more appropriately resolved by allowing the matter to go to trial.

Hyundai seeks to establish Merchant Marine's ultimate liability by alleging that Merchant Marine contributed to the loss of cargo. In this respect, Hyundai asserts in vague language that Merchant Marine improperly loaded the scrap cargo into an obviously unseaworthy vessel while the vessel was in a grounded position. Plaintiff also asserts that Merchant Marine directed the Vulca to sail from the port without any inspection of the vessel's hull. Merchant Marine's acts, Hyundai alleges, caused the ship to be unprepared for bad weather, and therefore caused the ship to sink, resulting in the loss of cargo.

Merchant Marine correctly points out that Hyundai's complaint neglects to state these alleged facts that could constitute imposition of liability upon Merchant Marine. Hyundai responded at oral argument on August 7, 1992 that it made this allegation only in the face of Merchant Marine's denials that it issued the bill of lading. This does not excuse a failure to comply with the pleading requirements set forth in Fed.R.Civ.P. 8. Hyundai, then, has fifteen days from the date of the order accompanying this opinion, to move to amend its complaint to state the cause of action alleged in its briefs in opposition to Merchant Marine's motion.

## CONCLUSION

For the foregoing reasons, Merchant Marine's motion for summary judgment is denied.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. Action No. 90-1589 (HAA)

Filed June 27, 1995

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HYUNDAI CORP., U.S.A., and
INCHON IRON & STEEL CO., LTD.,

*Plaintiffs*,

—VS.—

THE HULL INSURANCE PROCEEDS OF
the M/V VULCA, and

VULCAN NAVIGATION CORP. and
HYUNDAI MERCHANT MARINE CO., LTD.,

*Defendants.*

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ORDER AND JUDGMENT

WHEREAS this action came on for the trial before the Honorable Harold A. Ackerman, United States District Judge, without a jury from March 29 through April 1, 1993 and the Court after due deliberation rendered its decision in its Opinion and Order dated September 2, 1994; and

WHEREAS the matter was appealed to the United States Court of Appeals for the Third Circuit which issued a mandate on the Opinion, USCA No: 945589, which was filed on June 9, 1995; and

WHEREAS the mandate ordered that judgment of the District Court is affirmed with costs taxed in the sum of $400.43 in favor of Hyundai Corp. U.S.A.

IT IS ORDERED that judgment be entered for plaintiff Hyundai Corp., U.S.A. against defendant Hyundai Merchant Marine Co., Ltd., in the amount of $5,085,220.52 plus interest in the amount of 5.88% from the date of the loss, December 31, 1989.

The Clerk of the Court is hereby directed to enter the judgment forthwith.

Dated: Newark, New Jersey
June 26th, 1995

/s/ HAROLD A. ACKERMAN
Harold A. Ackerman
United States District Judge

No. 95-118

FILED
AUG 2 1995
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD.,

*Petitioner,*

—v.—

HYUNDAI CORP. U.S.A. AND INCHON IRON & STEEL CO., LTD.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to this proceeding are Petitioner Hyundai Merchant Marine Co., Ltd. and Respondent Hyundai Corp., U.S.A.

Parent corporations of Petitioner Hyundai Merchant Marine Co., Ltd. are:

Hyundai Engineering & Construction Co. Ltd.
Hyundai Pipe Co. Ltd.
Kemkang Development Industrial Co. Ltd.
Koryeo Industrial Development Co. Ltd.
Hyundai Precision & Industry Co. Ltd.
Hyundai Motor Service Co., Ltd.

Non-wholly owned subsidiaries of Petitioner Hyundai Merchant Marine Co. Ltd. are:

None.

Parent corporation of Respondent Hyundai Corp., U.S.A. is:

Hyundai Corporation, Seoul Korea

Non-wholly owned subsidiaries of Respondent Hyundai Corp. U.S.A. are:

None.

Inchon Iron & Steel Co., Ltd. is not a party to these proceedings. (*See* Order and Judgment of June 26th, 1995 in Appendix to Petition for a Writ of Certiorari at 39a-40a.)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

**No. 95-118**

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HYUNDAI MERCHANT MARINE CO., LTD.,

*Petitioner*,

—v.—

HYUNDAI CORP. U.S.A. AND INCHON IRON & STEEL CO., LTD.,

*Respondents*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

Hyundai Corp., U.S.A. respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## REASONS FOR DENYING THE WRIT

The court below was faced with the question of which party authorized the issuance of the bill of lading for the shipment in question. After days of trial and listening to all the facts, the district court determined on the bases of six points of fact

that only one conclusion could be reached, that Petitioner, Hyundai Merchant Marine Co., Ltd. [hereinafter "Merchant Marine"], authorized the issuance of the bill of lading. Once the fact that Merchant Marine issued the bill of lading is accepted, all of the law cited in the district court's opinion falls into place. The bill of lading evidenced a contract of carriage of goods by sea from a port in the United States, in foreign trade, which was negotiated to a holder, namely Plaintiff-Respondent, Hyundai Corp., U.S.A. Therefore, U.S. COGSA applies as a matter of law. Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1301 (1975).

Both the time and voyage charter parties contained a Clause Paramount providing that U.S. COGSA governs bills of lading issued pursuant to the charter parties. Bill of Lading No. 1 was signed pursuant to the charter parties and, therefore, U.S. COGSA governs. (C.A. App. 280-81.)

At trial, Merchant Marine offered no evidence whatsoever from the Master to contradict the facts. There is no evidence that the broad authority given to the port agent was in any way limited or restricted.

The instant case was decided on the facts and is not in conflict with the decision of any other circuit. The factual decision was affirmed by the circuit court "substantially for the reasons set forth in the district court's opinion." (see Judgment Order of April 11, 1995 in Appendix to Petition for a Writ of Certiorari at 2a.) Findings of fact do not belong before this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Petitioner's point concerning due diligence to make the vessel seaworthy is a misinterpretation of the court's decision. If the district court's opinion is read correctly, there is no conflict with other circuits.

### A. The Court of Appeals Decision That Petitioner Is a COGSA Carrier Is Not in Direct Conflict with Decisions of the First, Second, Fourth and Fifth Circuits.

Petitioner is correct in stating that COGSA defines a "carrier" as "the owner or the charterer who enters into a contract of carriage with the shipper." 46 U.S.C. § 1301(a).

Section 1301(a) defines a COGSA carrier as follows:

> The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

Both the vessel owner and the charterer may be held liable as carriers. *Joo Seng Hong Kong Co. v. S.S. UNIBULKFIR*, 483 F. Supp. 43 (S.D.N.Y. 1979); *Jordan Int'l Co. of Delaware v. M.V. CYCLADES*, 782 F. Supp. 25 (S.D.N.Y. 1992); *Aljassim v. SS SOUTH STAR*, 323 F. Supp. 918 (S.D.N.Y. 1971); *Thyssen Steel Caribbean, Inc. v. Palma Armadora S.A.*, 1984 A.M.C. 1133, 1141 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1441 (2d Cir. 1984); *see Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 978 F.2d 47, 50-51 (2d Cir. 1992).

Petitioner's statements, such as "[a]lthough Petitioner did not issue the bill of lading and was not in privity of contract of carriage with Respondents," (Pet. at 10), "if it did not issue the bill or if the party issuing the bill on its behalf lacked authority to do so," (Pet. at 13), and "[t]he Court, however, made no finding of fact, and there is no evidence in the record, that Petitioner authorized issuance of the bill of lading on its behalf," (Pet. at 15), are contrary to the findings of the district court. The court stated:

> While it is true that the bill of lading was not specifically signed by a representative of Merchant Marine, and certainly the bill is not on Merchant Marine's form, the following facts also came out at trial:

(1) Overseas was acting as Merchant Marine's agent at the port, though the scope of the agency relationship is not definite. Moreover Carolyn Comer, the Overseas representative, did not know on whose behalf the master signed the bill of lading;

(2) Clarendon did enter into a voyage charter party with Merchant Marine, and thus, the contract upon which the bill of lading was based was really with Merchant Marine;

(3) As found above, the bill of lading referenced and incorporated the voyage charter party;

(4) Payment of freight pursuant to the voyage party was contingent upon a bill of lading issued for the cargo;

(5) The Voyage Charter, by providing that "Ninety Percent (90%) of freight to be paid within 5 banking days after signing and releasing Bills of Lading Marked 'freight Paid as Per Charter Party'. . . ." "made provision for the possibility that [Merchant Marine] would authorize the bills of lading by signing or releasing them." *Samsung America Inc. v. M/T Fort Producer*, 798 F. Supp. 184, 187 (S.D.N.Y. 1992).

(6) Merchant Marine's port captain in New Jersey saw to the loading of the cargo, and in fact Merchant Marine continued monitoring and receiving reports about the transport of the cargo after the ship left New Jersey;

All these factors point to one conclusion: there is much evidence "tying [Merchant Marine] to the bill involved." *Joo Seng Hong Kong Co. Ltd. v. S.S. Unibulkfir*, 483 F. Supp. 43, 46 (S.D.N.Y. 1979); *Samsung*, 798 F. Supp. at 187. In other words, the evidence convinces me that Merchant Marine ***authorized*** the bill of lading.

(Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 18a-19a) (emphasis added).

A voyage or time charterer may become a COGSA carrier, if the charterer issues the bill of lading or directs another to issue the bill of lading on its behalf. *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278, 283 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266 (2d Cir. 1941).

The court found facts to support its contention that Merchant Marine authorized the bill of lading, therefore, all of Petitioner's arguments fail.

46 U.S.C. § 1302 of COGSA provides:

> [U]nder every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

**B. Petitioner, as a COGSA Carrier, Did Not Exercise Due Diligence to Make the Vessel Seaworthy Before the Voyage Commenced.**

Petitioner's argument that there was no finding by the court that Petitioner failed to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage is not correct. The court specifically stated in its opinion:

> Thus, in this case, there is a combination of sinking during expectable weather conditions and a series of factors independently evidencing unseaworthiness. Presumptively, then, Merchant Marine provided Hyundai with an unseaworthy vessel and the unseaworthiness was the proximate cause of the loss.
>
> In order to rebut this presumption, the carrier has the burden of proving that it exercised due diligence to make the ship seaworthy. See 46 U.S.C. § 1304; *Federazione*, 388 F.2d at 436. Merchant Marine attempts to rebut the presumption by pointing to the survey in Greece and the

> class certification. However, the carrier cannot meet this burden merely by producing certificates of classification. *Ionion Steamship Co. of Athens v. United Distillers*, 236 F.2d 78, 83 (5th Cir. 1956). Classification societies do not guaranty the seaworthiness of the ships that they classify. *Carbotrade SpA v. Bureau Veritas*, 1992 WL 367122 at *7 (S.D.N.Y. November 20, 1992). The duty of a classification society is merely to abide by their own rules and regulations in inspecting and classifying vessels in accordance with their own published standards. *Id.* Thus, the survey that led to the class certification is insufficient as a matter of law to rebut the presumption as well as the evidence of unseaworthiness adduced at trial.

(Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 20a-21a.)

The court's comment with respect to the incidents that happened after the voyage began merely confirmed the unseaworthiness condition that existed at the beginning of the voyage.

### C. The Decision Below Does Not Destroy the Conformity of Maritime Law.

The district court found that Petitioner provided an unseaworthy vessel, Petitioner failed to exercise due diligence to make the vessel seaworthy before the voyage, and that because of the unseaworthy condition, the vessel sank. It held Petitioner liable under the bill of lading and COGSA. This is in conformity with well-established maritime law and is not contrary to any other circuit.

## FURTHER ERRONEOUS COMMENTS IN PETITIONER'S BRIEF

On page 8, Petitioner stated: "Overseas received no authorization from Petitioner to sign the Bill of Lading, (C.A. App. 569-570), and the record contains no evidence that Petitioner directed the master to authorize Overseas to issue the bill of lading." This is contrary to the court's finding. Petitioner had appointed Overseas as its agent and there was no evidence of any limitation on the agency's authority. (*See* Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 18a.)

On page 8, Petitioner stated: "The vessel departed Long Beach on December 22, 1989, began taking on water forward on December 25th and sank six days later. The cause of the VULCA taking on water was never established. (14a-16a)." The district court found: "On December 25, however, the Master noted in the log that the ship was 'down by head'." (*See* Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 16a.) There is no evidence or conclusion as to when the vessel first started taking on water.

On page 11, Petitioner stated: "Moreover, the Court's ruling that under Section 3 of COGSA the carrier must exercise due diligence to make the ship seaworthy after commencement of the voyage irreconcilably conflicts with all reported decisions of other Circuits." The district court never stated that the carrier must exercise due diligence to make the ship seaworthy after commencement of the voyage.

On page 14, Petitioner stated: "In direct conflict with the First, Second, Fourth and Fifth Circuits, the Court below has held that a party's mere 'involvement' in the contract of carriage is sufficient to make that party a COGSA 'carrier.' " Nowhere in the district court's opinion was this held to be the case. *See supra* pp. 4-5.

On page 15, Petitioner stated: "The record is devoid of any evidence whatsoever that Petitioner issued the bill of lading, or instructed the VULCA's master or Overseas to issue bills of lading on Petitioner's behalf." The district court set forth in its finding six points of fact as to why it concluded that Petitioner authorized the issuance of the bill of lading.

On page 16, Petitioner stated: "Since Petitioner did not issue the bill of lading, or direct it to be issued, Petitioner cannot be a 'carrier' as defined by Section 1(a) of COGSA." The district court found in fact that Petitioner had authorized the bill of lading to be issued. *See supra* pp. 4-5.

On page 16, Petitioner stated: "The proper COGSA carrier, therefore, is the owner, Vulcan Navigation." (footnote omitted). There is no question that the Master bound the owner. The district court found that Petitioner authorized the bill of lading and this bound Petitioner as a COGSA carrier.

On page 17, Petitioner stated: "The time charterer, however, has no role in the navigation or cargo operations of the vessel." The district court found to the contrary. "(6) Merchant Marine's port captain in New Jersey saw to the loading of the cargo, and in fact Merchant Marine continued monitoring and receiving reports about the transport of the cargo after the ship left New Jersey;" (*See* Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 18a.)

On page 17, Petitioner correctly stated: "If the time charterer books the cargo, and issues its own bill of lading, then the time charterer has knowingly made itself a party to the bill of lading and is properly liable as a COGSA carrier." This is a fact which the court found. Petitioner's continuation of the statement, "[b]ut no logic supports holding a time charterer who does not issue a bill of lading liable for cargo damage caused by operational, mechanical, or navigational faults of the vessel or those who man her," is not relevant.

On page 18, Petitioner stated that the instant case would "disrupt the international uniformity now achieved and undermine the purposes of the international convention." It would only be so if the facts of the case were contrary to the findings of the district court.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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